Filed 2/18/09 Enriquez v. Greenpoint Mortgage Funding CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROSALINDA ENRIQUEZ, Plaintiff and Appellant, v. GREENPOINT MORTGAGE FUNDING, Inc., et al., Defendants and Respondents.	G038470 (consol. w/ G038887) (Super. Ct. No. 04CC06074) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, H. Warren Siegel and William M. Monroe, Judges. Reversed.

Law Offices of Sally L. Gersten and Sally L. Gersten for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan Zak and Kathy Shakibi for Defendants and Respondents.

* * *

Plaintiff Rosalinda Enriquez refinanced her home, replacing her previous loan with a new loan and home equity line of credit (HELOC) obtained from defendant Greenpoint Mortgage Funding, Inc. (Greenpoint). Incorrectly believing the HELOC proceeds would be used to pay off the outstanding balance on her car loan, Enriquez repeatedly asked Greenpoint and defendant Marin Conveyancing Corporation (Marin), the loan servicing agent, about the use of the HELOC proceeds. Receiving no response, plaintiff eventually stopped making payments on the HELOC, hoping this course of action would cause defendants to answer her questions. Defendants foreclosed on plaintiff's home, and set a date for auction. Although defendants were willing to let plaintiff redeem the property up to the time of the sale, plaintiff presented the redemption money to the auctioneer five minutes after the property had been sold.

Plaintiff sued defendants for breach of contract for not allowing her to redeem the property, and for violations of the Truth in Lending Act, title 15 of the United States Code, section 1601 et seq. (TILA), and the Fair Credit Billing Act, title 15 of the United States Code, section 1666 et seq. (FCBA), based on defendants' failure to provide plaintiff with disclosures and the information she requested. The trial court granted defendants' motion for judgment on the pleadings (MJP) on plaintiff's claims without leave to amend, and plaintiff now appeals the resulting judgment and subsequent attorney fee award to defendants.

We conclude the trial court did not err in granting the MJP without leave to amend as to plaintiff's TILA and FCBA claims because they are barred by the statute of limitations. Over one year has passed since the loans closed and plaintiff became aware of a potential error in the use of the HELOC proceeds, and plaintiff failed to demonstrate she could allege facts supporting a tolling of the statute of limitations. Because plaintiff is unable to demonstrate how she could amend her complaint to avoid the limitations bar, we conclude the trial court did not abuse its discretion in denying leave to amend as to these causes of action.

Nonetheless, we reverse the judgment to allow plaintiff to amend her complaint. Although defendants had no statutory duty to allow plaintiff to redeem her property at the time of the sale, defendants' counsel conceded during oral argument that the parties reached a contract with plaintiff allowing her to do so. Although plaintiff had not specifically alleged this contract in her breach of contract cause of action, defendants' concession, along with plaintiff's allegation that defendants' agent, the auctioneer, held the foreclosure sale early, provides a basis for us to grant plaintiff leave to amend her complaint. Because we reverse the judgment, we also reverse the trial court's attorney fee award for defendants.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, plaintiff purchased a residence in Garden Grove with her brother, and obtained an adjustable rate mortgage listing both as borrowers. In January 2000, plaintiff and her brother agreed plaintiff would obtain a mortgage in her name only. Plaintiff approached Amerifirst Mortgage Corporation (Amerifirst) to obtain a new loan. The principal on the existing loan was approximately $151,000. Amerifirst first sought to obtain a singe loan, but due to plaintiff's credit score, Amerifirst eventually obtained two separate loans from Greenpoint, a note secured by a first trust deed in the amount of $144,000, and HELOC in the amount of $15,500. From the time plaintiff applied for the two new loans, and continuing until after filing suit, she mistakenly believed the HELOC would be used to pay off the balance of her existing car loan.[1]

Plaintiff began making loan payments after the loans closed on January 20, 2000. Noting that her car loan had not been paid off as she anticipated, plaintiff called Greenpoint repeatedly in 2001, 2002, and 2003, asking what had become of the $15,500

[1] The HELOC proceeds were used to cover the $7,000 shortfall between the old and new first loans, plus the lender, escrow, title, etc., fees applicable to the two new loans.

HELOC proceeds. At one point in 2002, plaintiff stopped making payments on the HELOC to induce Greenpoint to answer her questions regarding the proceeds. Because Greenpoint threatened to foreclose on her home, plaintiff paid the 2002 arrearages and again resumed making payments on the HELOC.

Plaintiff again stopped making payments in early 2003, and on February 4, 2004, Marin, as foreclosure trustee, filed a notice of trustee's sale, and set a sale date of February 25, 2004. Marin rescheduled the sale date for March 25, 2004, at 2:00 p.m. At 2:00 p.m. on the day of the sale, plaintiff had a third party approach the auctioneer with cashier's checks in the amount necessary to redeem the property. The auctioneer, however, had sold the property five minutes earlier.

Plaintiff sued Amerifirst, Greenpoint, Marin, the auctioneer, and the purchasers at the foreclosure sale. After the trial court granted summary judgment to the purchasers, plaintiff filed her first amended complaint against the remaining defendants, alleging causes of action for, inter alia, breach of contract, violation of TILA, and violation of FCBA. Relying on plaintiff's federal TILA and FCBA claims, defendants removed the action to federal court. Because defendants failed to include all of the named defendants in the removal notice, the federal district court remanded the case and awarded plaintiff $9,355 for attorney fees and costs incurred in connection with the removal.

On June 28, 2006, defendants filed their first MJP, contending the statute of limitations barred, inter alia, plaintiff's TILA and FCBA claims. The trial court granted the motion as to the TILA and FCBA claims with leave to amend.

Plaintiff filed her second amended complaint on August 15, 2006, again alleging claims for breach of contract (first cause of action), violation of TILA (fifth cause of action), and violation of FCBA (sixth cause of action). Plaintiff also asserted the TILA and FCBA claims against Amerifirst. On October 16, 2006, the trial court sustained Amerifirst's demurrer to these two causes of action without leave to amend.

On December 1, 2006, the last day to file and personally serve motions before trial, defendants filed their second MJP, challenging the breach of contract, TILA, and FCBA claims. Defendants served plaintiff's counsel at her home office at 5:33 p.m. that same day. After plaintiff objected to the service in her opposition, defendants filed an ex parte application for an order deeming the service adequate. The trial court granted the application.

After hearing, the trial court granted the second MJP on all of plaintiff's remaining claims against defendants without leave to amend. As to the breach of contract claim, the court reasoned: "[P]laintiff alleges no facts re duty to accept tender on day of sale, and alleges no consideration for new contract." On the TILA and FCBA claims, the court determined: "No specific facts alleged re fraudulent intent or concealment. Responding party suggestion of new legal theory — equitable tolling — is outside pleading of facts in 2nd amended complaint." The trial court entered judgment for defendants.

Having prevailed on all claims plaintiff asserted against them, defendants moved for attorney fees under a provision of the trust deed, and requested the trial court set off the federal court fee award to plaintiff. The trial court granted defendants' motion, rendering an initial award of $117,198, minus an offset for the $9,355 federal court attorney fee award, for a net award of $107,843. The trial court ordered defendants to calculate a further fee reduction based on the time spent on their attempt to remove the case to federal court.

Plaintiff filed her first motion for reconsideration of the fee award order, contending the trial court could not offset her federal court fee award, and requesting a further reduction in fees. The trial court denied reconsideration on the offset issue, and continued the fee reduction issue. Defendants submitted a supplemental brief that included a smaller fee award to account for the time their attorneys devoted to removing

the case to federal court. The trial court then reduced the $107,843 award by $13,165, for a net award of $94,678.

Plaintiff filed her second motion for reconsideration, seeking a further reduction of fees. As a result, the trial court granted a further fee reduction of $5,494, for a final fee award of $89,184. Plaintiff now appeals the judgment and order granting attorney fees.

II

DISCUSSION

A. *Plaintiff Has Failed to Demonstrate Prejudice from Receiving Statutorily Insufficient Notice*

Defendants filed and served the second MJP 16 court days before the scheduled hearing and attempted personal service on plaintiff's attorney that same day. Defendants, however, served the papers at the attorney's home office at 5:33 p.m., 33 minutes late under Code of Civil Procedure section 1011, subdivision (a).[2] Plaintiff

---

[2] Code of Civil Procedure section 1011, subdivision (a), provides: "If upon an attorney, service may be made at the attorney's office, by leaving the notice or other papers in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or with a person having charge thereof. When there is no person in the office with whom the notice or papers may be left for purposes of this subdivision at the time service is to be effected, service may be made by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office, or, if the attorney's office is not open so as to admit of that service, then service may be made by leaving the notice or papers at the attorney's residence, with some person of not less than 18 years of age, if the attorney's residence is in the same county with his or her office, and, if the attorney's residence is not known or is not in the same county with his or her office, or being in the same county it is not open, or a person 18 years of age or older cannot be found at the attorney's residence, then service may be made by putting the notice or papers, enclosed in a sealed envelope, into the post office or a mail box, subpost office, substation, or mail chute or other like facility regularly maintained by the Government of the United States directed to the attorney at his or her office, if known and otherwise to the attorney's residence, if known. If neither the attorney's office nor residence is known, service may be made by delivering the notice or papers to the address of the attorney or party of record as designated on the court papers, or by delivering the notice or papers to the clerk of the court, for the attorney."

timely filed her opposition, which opposed defendants' motion both on the merits and on the grounds of untimely service. Defendants applied ex parte for an order either deeming the service proper or shortening time to hear the motion. The trial court granted the petition, determining the lapse insignificant. The court also denied plaintiff's request for a supplemental opposition brief. Plaintiff contends the trial court abused its discretion in determining the notice given was sufficient. We disagree.

"In order to obtain a reversal based upon [inadequate notice], the appellant must demonstrate not only that the notice was defective, but that he or she was *prejudiced*." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289.) Plaintiff has not specified in her appellate briefs any prejudice she suffered from the improper notice. Plaintiff does, however, cite her opposition to defendants' ex parte application, in which she asserts the following: "In this litigation all parties are preparing for the mediation scheduled for December 19, 2006, where Plaintiff is filing numerous notices of depositions for after the mediation. Plaintiff will be severely prejudiced by adding additional hours of preparation time concerning Defendants' application." The foregoing references only the burden of opposing the MJP, and does not suggest this burden was made any greater by service being effected one-half hour late. Because plaintiff has failed to specify any prejudice arising from the belated service, we conclude any error in not granting plaintiff relief is harmless.

B. *The Trial Court Did Not Err in Granting Judgment on the Pleadings on Plaintiff's Fifth Cause of Action for TILA Violation*

In her fifth cause of action plaintiff alleges, "Defendants violated TILA and Regulation Z by: [¶] a. Failing to provide Plaintiff with material disclosures in a form she could keep prior to consummation; and [¶] b. Failing to provide Plaintiff with notices of right to cancel that were clear, conspicuous, and reflective of the parties' legal obligation." In granting judgment on the pleadings, the trial court determined the statute

of limitation barred on their face both causes of action. Plaintiff contends the trial court erred because she alleged facts sufficient to demonstrate tolling. We disagree.

Congress enacted the TILA to ensure meaningful disclosures in consumer credit transactions. (15 U.S.C. § 1601(a)). Actions for damages under TILA are governed by title 15 of the Unites States Code, section 1640(e), which provides, in part: "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." For claims arising from a lender's failure to make required disclosures, the violation occurs on the date the loan closes. (See *Morris v. Lomas & Nettleton Co*. (D.Kan. 1989) 708 F.Supp. 1198, 1203.)

As defendants concede, the one-year limitations period is not absolute, as recognized by *King v. State of California* (9th Cir. 1986) 784 F.2d 910, 915, which held: "[T]he limitations period in Section 1640(e) runs from the date of consummation of the transaction but . . . the doctrine of equitable tolling may, in the appropriate circumstances, suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action. Therefore, as a general rule the limitations period starts at the consummation of the transaction. The district courts, however, can evaluate specific claims of fraudulent concealment and equitable tolling to determine if the general rule would be unjust or frustrate the purpose of the Act and adjust the limitations period accordingly."

In California, the plaintiff has the burden of pleading specific facts demonstrating tolling of the statute of limitations. (See *Fox v. Ethicon Endo-Surgery Inc*. (2005) 35 Cal.4th 797, 815.) As to tolling, plaintiff's second amended complaint alleges: "Any and all statute of limitations relating to disclosures and notices required under 15 U.S.C. section 1601 *et seq*., are tolled due to the Defendants' failure to effectively provide the disclosures and notices." In essence, plaintiff seeks to use the very nondisclosures upon which the TILA violations are based to demonstrate tolling. If we

accepted this rationale, the one-year statute of limitations would be rendered meaningless because tolling would apply in every case.

Plaintiff asserts her allegations concerning her efforts to clarify how defendants used the HELOC proceeds support equitable tolling. Equitable tolling suspends the statute of limitations where the plaintiff has several alternative remedies, makes a good faith, reasonable decision to pursue one remedy, and it later becomes necessary to pursue the other. The doctrine relieves the plaintiff from the hardship of pursuing duplicate and possibly unnecessary procedures in order to enforce the same rights or obtain the same relief. (*Downs v. Department of Water & Power* (1997) 58 Cal.App.4th, 1093, 1100.)

Plaintiff cites no cases applying the equitable tolling doctrine to informal attempts to resolve a loan dispute. In *65 Butterfield v. Chicago Title Ins. Co.* (1999) 70 Cal.App.4th 1047, the court addressed whether settlement negotiations may equitably toll the statute of limitations. There, the county government claimed an easement on property the plaintiff owned. After attempts to resolve the matter informally, the plaintiff sued the county and plaintiff's title insurer. By this time, however, the two-year statute of limitations for actions against title insurers had run. The court rejected the plaintiff's attempt to use equitable tolling to preserve its claim against the insurer for two reasons. First, in each case the plaintiff cited, "the plaintiff took formal legal action in pursuit of its alternative remedy, either against the defendant or against a third party," but the plaintiff had "merely engage[ed] in informal [settlement] negotiations." Second, the court noted that "equitable tolling only applies where the defendant receives notice, *within* the limitations period, of the plaintiff's pursuit of the alternative remedy, so that the defendant is aware of the need to begin investigating the matter" and there was "no indication [the plaintiff] notified Chicago [Title] of its attempts to resolve the easement dispute with the County at any time during the limitations period." (*Id.* at p. 1063.)

Here, it is unclear whether plaintiff notified defendants of her claims within the limitations period. Assuming she had, however, she never engaged in any formal dispute resolution procedure, or alleged the parties held any informal settlement talks. At best, plaintiff *attempted* to engage defendants in a dispute resolution procedure. But defendants never responded to plaintiff, and it should have been clear to plaintiff years before filing her suit that legal action would not be unnecessary or duplicative of her efforts. Thus, even if we applied tolling, the tolling period would have ended well before she filed suit.

C. *The Trial Court Did Not Err in Granting Judgment on the Pleadings on Plaintiff's Sixth Cause of Action for Violation of FCBA*

In her sixth cause of action, plaintiff alleges, "Defendants violated the Fair Credit Billing Act by: [¶] a. Failing to provide Plaintiff with material disclosures in a form she could understand regarding the disposition of the $15,500.00 loan; [¶] b. Failure to respond to Plaintiff's oral requests; [¶] c. Failure to respond to Plaintiff's written requests; [¶] d. Continuing to send out invoices without clearing up the disputed items; and [¶] e. Continuing the foreclosure auction without clearing up the disputed items."

The FCBA is part of the TILA and outlines dispute resolution procedures for both debtors and creditors. "To succeed on a claim under 15 U.S.C. § 1666, plaintiff must show (1) the existence of a billing error, (2) timely notification of the billing error, and (3) failure of the bank issuing the card to comply with the procedural requirements of Section 1666." (*Cunningham v. Bank One* (W.D. Wash. 2007) 487 F.Supp.2d 1189, 1191-1192.) Specifically, "To trigger a creditor's obligation to investigate a disputed billing statement, a consumer must send written notice within 60 days of the creditor's transmission of the statement containing the alleged error. [Citation.] Regulation Z [implementing TILA] specifies that the 60-day period begins to run 'after the creditor [has] transmitted the *first* periodic statement that reflects the alleged billing error."

(*Id.* at p. 1193) After notice is given to a creditor, a claim for relief must be brought within one year of the creditor's failure to correct the error. (15 U.S.C. § 1640(e).)

Plaintiff complained she had not received the benefit of the loan because the bank did not apply the HELOC funds to pay off her car loan. This purported error therefore appeared on the first monthly statement plaintiff received after the loan closed in January 2000. But plaintiff is vague about when she sent written notice, alleging only that she wrote Greenpoint on "several occasions" at the same time she made payment. Plaintiff further alleges she "called Greenpoint repeatedly in 2001, 2002 and 2003" and at one point in 2002 temporarily ceased making payments because of the dispute.

Regardless of when plaintiff wrote letters to defendants, however, her claim is time-barred. If she had provided written notice explaining the alleged error within 60 days of receiving her first bill in 2000, the statute of limitations would have run a year later in 2001. If she provided notice within a year of filing suit in 2004, she accordingly failed to notify defendants within the 60-day required time frame. We therefore conclude the trial court correctly determined plaintiff's FCBA claim was time-barred.

Plaintiff contends the trial court erred in denying leave to amend to plead equitable tolling. We disagree. The trial court initially granted defendants' motion for judgment on the pleadings attacking plaintiff's first amended complaint with leave to amend, holding plaintiff's TILA and FCBA claims were time-barred. Plaintiff filed a second amended complaint, but failed to allege facts demonstrating the statute had been tolled. Although plaintiff raised tolling in opposition to defendants' motion attacking the second amended complaint, plaintiff did not demonstrate she could allege facts justifying application of tolling in her case.

Whether a trial court should grant leave to amend depends on whether there is a reasonable possibility that the defect can be cured by amendment. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.) If a cure is reasonably likely, the court abuses its discretion by not granting leave to amend. (*Ibid.*) The plaintiff

carries the burden of demonstrating she can cure the pleading defect. (*Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006)143 Cal.App.4th 131, 135.) Because plaintiff has failed to meet her burden of demonstrating she could amend the second amended complaint to allege facts justifying tolling in the present case, we conclude the trial court did not abuse its discretion in denying leave to amend.

D. We Reverse the Trial Court's Grant of Judgment on the Pleadings on Plaintiff's First Cause of Action for Breach of Contract

Plaintiff's first cause of action alleges that Greenpoint and Marin breached their contractual relationship with plaintiff in three ways: (1) failing to respond to plaintiff's inquiries regarding the use of the HELOC proceeds; (2) failing to suspend HELOC payments while investigating the matter; and (3) rejecting her tender of payment and proceeding with the foreclosure sale.

The first two alleged breaches concern a notice in the HELOC agreement which provides, in relevant part: "If you think your bill is wrong, or if you need more information about a transaction on your bill, write us at the address listed on your bill. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights. . . . [¶] . . . [¶] We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct. [¶] After we receive your letter, we cannot try to collect the amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that is not in question. [¶] . . . [¶] If we don't follow these rules, we can't collect the first $50 of the questioned amount, even if your bill was correct."

Although plaintiff alleges the foregoing provision constitutes a contract term, it merely provides notice of the borrower's rights under the FCBA, and is therefore subject to the limitations of that act. As we determined above, plaintiff's FCBA claims are time-barred. Accordingly, we conclude the trial court did not err in rejecting the first two alleged contract breaches in plaintiff's first cause of action.

The third breach of contract claim in the first cause of action, defendants' alleged rejection of tender, refers to plaintiff's attempt to tender the full amount owed in time to prevent the forced sale of her home. Absent a contractual term to the contrary, the borrower's right of reinstatement is outlined in Civil Code section 2924c subdivision (e), which provides, in relevant part: "Reinstatement of a monetary default under the terms of an obligation secured by a deed of trust, or mortgage may be made at any time within the period commencing with the date of recordation of the notice of default until five business days prior to the date of sale set forth in the initial recorded notice of sale. [¶] In the event the sale does not take place on the date set forth in the initial recorded notice of sale or a subsequent recorded notice of sale is required to be given, the right of reinstatement shall be revived as of the date of recordation of the subsequent notice of sale, and shall continue from that date until five business days prior to the date of sale set forth in the subsequently recorded notice of sale. [¶] . . . [¶] . . . *Any right of reinstatement created by this section is terminated five business days prior to the date of sale set forth in the initial date of sale, and is revived only as prescribed herein* . . . ." (Italics added.) Thus, any statutory right plaintiff had to reinstatement ended five business days before March 25.

A trustee has no duties to the trustor beyond the rights specified by statute and contract. Indeed, "[t]he trustee under a deed of trust 'is not a true trustee, and owes no fiduciary obligations; [it] merely acts as a common agent for the trustor and the beneficiary of the deed of trust. . . . [The trustee's] only duties are: (1) upon default to undertake the steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the

secured debt to reconvey the deed of trust.' [Citation.] Consistent with this view, California courts have refused to impose duties on the trustee other than those imposed by statute or specified in the deed of trust." (*Heritage Oaks Partners v. First American Title Ins. Co*. (2007) 155 Cal.App.4th 339, 345.)

Nothing, however, prevents the trustee from agreeing with the trustor to create a right to reinstatement up to the time of sale. (See *Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 712.) Here, defendants' counsel conceded during oral argument that plaintiff and defendants formed a contract to allow her to redeem the property by tendering a specified sum to the auctioneer at any time before the sale. Although plaintiff's first cause of action does not specifically refer to this separate agreement, defendant's concession of its existence demonstrates a sufficient basis for allowing plaintiff leave to amend. (See *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152 [""While briefs and arguments are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may make use of statements therein as admissions against the party""].)

Accordingly, we reverse the judgment, and grant plaintiff leave to amend her complaint to include a cause of action for breach of this agreement. Because we reverse the judgment, we also reverse the trial court's order awarding defendants prevailing party attorney fees.

III

DISPOSITION

The judgment and attorney fee order are reversed. In the interests of justice, each party is to bear its own costs of this appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.